LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
JAN 14 1948
CHARLES ELMORE CROPLEY
CLERK

No. 132

In the Supreme Court of the United States

October Term, 1947

THE UNITED STATES, PETITIONER

v.

RICHARD S. GOE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO RESPONDENT'S SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI TO CORRECT SAME

The United States opposes the granting of respondent's motion to correct the alleged diminution of the record.

1. The suggestion and motion are untimely and should not be received.

The Government's petition for a writ of certiorari, and the certified transcript of the record, were filed in this Court on June 29, 1948. The

record was printed by July 9, 1948, and service thereof, as well as of the petition, was made on counsel for respondent on July 17 and 19, 1948. The petition was granted on October 11, 1948. The United States served its brief on the merits, which is based on the record as certified and printed, upon counsel for respondent on December 22, 1948.[1] We have been informed by the Clerk that the case is set for argument during the session of the Court which commences on January 31, 1949. The brief for respondent has not yet been served on the United States.

At least since August 20, 1948, when respondent's brief in opposition to the petition for a writ of certiorari was received by petitioner, respondent's counsel has included, among others, the firm of Covington, Burling, Rublee, Acheson & Shorb, as appears on the face of respondent's brief in opposition (cover, p. 21). In addition, that firm filed a brief *amicus curiae* in this case when it was pending before the Court of Claims (R. 5, 14), and a representative of that firm presented oral argument in that court (R. 5).

Petitioner received no intimation or suggestion that the record, as certified and printed, was unsatisfactory to counsel for respondent, or that it omitted any matter considered material to the issues placed before this Court by the granting of

---

[1]Appendices D, E, F (which were separately printed) were served on December 27, 1948.

the petition for a writ of certiorari, until the afternoon of January 7, 1949. Petitioner has founded its argument on the record now before the Court.

We submit that the motion is most untimely, under Rule 17 of the Rules of this Court, which requires that such motions be filed "not later than the first motion day after the expiration of sixty days from the printing of the record [July 9, 1948, herein], unless for special cause shown the Court receives the motion at a later time." No special cause has been shown for receiving it at this very late date.

2. The present record contains all matter relevant to the errors assigned by the United States and to the questions presented to this Court by the petition for a writ of certiorari.

a. The Government's petition and brief present only issues of the interpretation and unconstitutionality of a portion—the so-called "enhancement" clause—of Section 902 of the Merchant Marine Act, 1936, as amended, which concerns the requisition of and just compensation for merchant vessels during the war. No challenge has been made to the Special Findings of Fact of the Court of Claims; the Government's position is that, on the basis of those findings, the Court of Claims misapplied and misconstrued the statute in refusing to deduct certain enhancement which it found to have occurred. In particular, the Government

has not raised before this Court the correctness of the lower court's finding that the current "market value" of the brig *MacArthur*—the requisitioned vessel here involved—at the time and place of taking was $15,500 (R. 12). Nor has respondent cross-petitioned for a writ of certiorari, alleging that the Court of Claims' award was too low, or that its findings of fact were erroneous. In these circumstances, the testimony before the Court of Claims, upon which it based its findings of fact, are plainly not material to the errors assigned or to the questions presented to this Court.

The Act of May 22, 1939, 53 Stat. 752, which first authorized the bringing up of the evidence before the Court of Claims, provides that the testimony which is brought up must be "material to the errors assigned." Where the petitioner does not raise issues concerning the correctness of the Court of Claims' findings of fact, but presents only questions of law, that statute does not contemplate any right in the respondent to bring up the evidence, either in support or in contradiction of the Court of Claims' findings, unless he files a cross-petition for a writ of certiorari. Accordingly, Rule 99 of the Court of Claims (set forth in the Appendix) provides for the certifying of testimony or evidence only in case the *petitioner* requests more than the pleadings, findings of fact, conclusions of law, judgment, and opinion of the Court of Claims.

b. The evidence which respondent now seeks to include in the record consists almost entirely of testimony concerning *offers* of $18,000 and $17,500 for the *MacArthur* prior to its requisition. Respondent does not indicate why he considers this testimony material, but, even if it were competent evidence of value, it would go only to show that the Court of Claims' finding of a current "market value" of $15,000—which we do not contest—is too low. But respondent has not challenged that finding by cross-petition, and the transcript of testimony before the Court of Claims contains other competent evidence which the lower court credited and upon which its finding was based (R. 14).

If respondent is to be permitted, at this stage, to add such testimony to the record, there will be injected into the case factual contentions which are not rightly present and which are not material to the errors assigned and the questions raised by the petition. Fairness would require that the United States be permitted the opportunity to examine the testimony below and to bring up other portions of the testimony bearing upon the parts respondent now seeks to add, as well as opportunity to recast its argument on the basis of the additional material. The character of the controversy might well be materially changed from one over important issues of law to one involving the correctness of the findings of specific facts in this par-

ticular case, an issue which certainly could not have induced this Court to grant the Government's petition for certiorari. And as the record now stands, respondent cannot properly claim that he is prejudiced in any way, on the issues presented to this Court by the Government's petition in this case.

For these reasons, it is respectfully submitted that the motion be denied.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1949

Rule 99 of the Rules of the Court of Claims provides:

Application for Transcript of Record

99. Upon the rendition of final judgment in any case it shall be the duty of the clerk to furnish a certified transcript of the record in said case to the plaintiff or his attorney of record, or to the Assistant Attorney General, upon written application therefor stating that the plaintiff or the United States, as the case may be, intends to file a petition without unnecessary delay for a writ of certiorari. The clerk shall notify the adverse party or his attorney of record of the application for such writ.

(a) Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the court but also "other parts of the record as are material to the errors assigned," the party making the request for the record shall file with the court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel

a copy of the same at the same time it is filed in the court.

Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the court and service upon him of the above record, file with the clerk of the court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The court will then settle the record to be certified.

"See Rule 41 of the Supreme Court as amended March 25, 1940, and Supreme Court General Equity Rules."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1946 621117 383